UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS FOGARTY, JR.,

Plaintiff,

-against-

CITY OF TROY and City of Troy Police Officers KYLE JONES and ROBERT SMITH, both Individually and/or as agents, servants, and/or employees of the City of Troy,

Defendants.

AFFIDAVIT

Civil Case No.: 15-cv-01454 (GLS/DJS)

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

ROBERT SMITH, being duly sworn deposes and says:

1. I am a Patrolman, canine handler, employed by the City of Troy, New York Police Department since July 18, 2003, and I am a named defendant in this action.

2. I submit this affidavit in support of my Motion for Summary Judgment.

3. On Sunday, December 23, 2012 at approximately 1:25 a.m., I assisted Officer Kyle Jones in affecting an arrest of the plaintiff, Francis Fogarty. An Incident Report, Deposition, and Supplemental Depositions were generated in connection with Mr. Fogarty's arrest and are maintained by the City of Troy Police Department. A true and accurate copy of the Report with Depositions is attached hereto as Exhibit "1".

4. The events surrounding my involvement in Francis Fogarty's arrest are accurately depicted in the Incident Report and my supplemental depositions, as well as in the deposition testimony I provided on January 23, 2017.

5. On that day, I was assigned a city-wide DWI patrol. My shift was from 11:30 p.m. to 3:30 a.m.

6. I was patrolling with my K-9 in a patrol car when I heard a call out over the police radio by Officer Jones that there had been a fight at Bootleggers, with a description of the suspect and that he was in foot pursuit.

7. I observed an individual matching the description given by Officer Jones run from an alley onto State Street and turn west toward 2nd Street. I pursued in my vehicle. I pulled up next to Mr. Fogarty with my window open and gave a verbal command for him to stop running or a K-9 would be released.

8. Mr. Fogarty stopped running. He had a black object in his hand which I could not identify. I gave verbal commands for Mr. Fogarty to lay on the ground and drop the object in his hand. He refused. I used force to place Mr. Fogarty onto the ground and ordered that he put his hands behind his back. The unidentified object was still in his hand. Mr. Fogarty again refused, keeping his hands with the object under his torso and actively resisting arrest. I knelt next to him on his left side and attempted to pull his arms behind his back to force compliance.

9. At this point, Officer Jones arrived on scene and immediately approached Mr. Fogarty, also ordering him to put his hands behind his back. Officer Jones struck Mr. Fogarty in the upper right portion of his body with his baton, in two swift successive motions, in attempt to obtain his compliance. At this time, I was able to pull Mr. Fogarty's left arm from underneath him and he was handcuffed by Officer Jones.

10. I did not know that Officer Jones was going to use his baton prior to his doing so. Officer Jones and I are both patrolman. I did not have supervisory authority

over Officer Jones on December 23, 2012. I was not present during Officer Jones' initial interaction with Mr. Fogarty.

11. During the altercation, Mr. Fogarty released the black object, which I identified to be a cell phone.

12. After he was handcuffed, Mr. Fogarty was taken Central Station for booking. He did sustain a laceration to the top of his head and was offered medical treatment by City of Troy Fire Department. He was ultimately released with an appearance ticket.

Dated: March 2, 2017

s/
ROBERT SMITH

Sworn to before me this ____
day of February, 2017.

s/
Notary Public – State of New York